No. 11,969

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EDWARD J. McBRIDE, doing business as Continental Press Service,

Appellant,

vs.

THE WESTERN UNION TELEGRAPH COMPANY, a corporation,

Appellee.

PETITION FOR REHEARING.

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Comes now the appellant in the above entitled cause and presents his Petition for Rehearing of the above entitled cause and, in support thereof, respectfully shows:

That the opinion of this Honorable Court in this case is at variance with the Transcript of Record and is contrary to law in the following particulars:

I.

The opinion is based upon a misconception of the relief sought and is at variance with the Transcript of Record.

II.

The opinion is in direct conflict with an applicable state decision.

III.

The opinion deprives appellant due process guaranteed to him by the Fifth Amendment to the United States Constitution.

IV.

The opinion abridges appellant's privilege of free speech and freedom of the press guaranteed to him by the First Amendment to the United States Constitution.

I.

The Opinion Is Based Upon a Misconception of the Relief Sought and Is at Variance With the Transcript of Record.

The opinion of this Court discloses its decision is predicated upon a statement of fact clearly erroneous and which is directly contrary to and at variance with the Transcript of Record. The statement is on page 4 of the opinion and is as follows:

> "McBride's racing news from the race tracks of other states was sold to a California corporation, Consolidated Publishing Co. of Los Angeles. *Through the latter's direction, the out of state race track news was received through the drops in various places in California.*" (Emphasis supplied.)

Consolidated Publishing Company, hereinafter sometimes referred to as "Consolidated," is a partnership located in Los Angeles, California, having no connection whatsoever with the various drops referred to in this Court's opinion [R. 13, 14]. Consolidated's only connection of any type or kind whatsoever with the Morse wire of appellant consisted of the one connection, com-

monly referred to by The Western Union Telegraph Company as a drop. This drop was the one through which it received news from appellant [R. 8, 13]. That news was and is used solely in Consolidated's publications, and is not transmitted otherwise to any other person or concern of any kind [R. 15, 16].

The manner in which Consolidated conducts its business is no different than that of its competitor, the National Scratch Sheet, which is presently continuing in business in Los Angeles, California [R. 15].

Consolidated received daily news, including racing news, from appellant's transcontinental Morse wire and uses that news to make up its various publications which are sold throughout the State of California and in the State of Nevada [R. 14]. Consolidated uses no wire service to transmit any news to anyone. Consolidated publishes at least five daily papers, commonly referred to as scratch sheets, which contain mainly racing news although some general news is used [R. 14]. The method of distribution is the same as that of an ordinary daily newspaper. Route men call upon the news dealers throughout the area and deliver the number of scratch sheets requested by the dealers and the following day collect for those sold and allow credit for those remaining unsold [R. 15].

Consolidated Publishing Company is simply a publisher and nothing more. No one has ever indicated by the slightest inference that Consolidated Publishing Company was engaged in any illegal activity of any kind, and the Transcript of Record it at variance with this Court's statement of fact on page 4 of its opinion heretofore referred to. It might as well be contended that Consolidated should have its drop or connection with United Press

terminated, but no effort so far has been made to sever this by any so-called law enforcing officer.

This Court's opinion on page 3 states:

> "It is not necessary that there be a guilty participating of the sender of the messages to the drop. *The guilty use of the drop in receiving the messages is enough to show an illegal use of the wires' service.*" (Emphasis supplied.)

The above quoted sentence combined an erroneous statement of fact and an erroneous conclusion of law. The Transcript of Record must necessarily contain facts showing some activity on the part of Consolidated in receiving news which might be in violation of a stated principle of law—in this case 337a of the Penal Code of California (Book-making). Thus, in order for this Court's quoted statement to be true, Consolidated, in the use of its drop, would necessarily have to, in some way, be involved in actual wagering on horse races.

The Transcript of Record in this case, in so far as evidentiary matters are concerned, consists of the pleadings only. There was no trial. Therefore, such facts that were before the Court for consideration were to be found only in the pleadings and supporting affidavits. Appellant's Complaint, and specifically the two affidavits in support of the Order to Show Cause, shows without question that Consolidated was engaged in a legal business—namely, that of selling its publications on newsstands. Nowhere in appellee's Answer or in the affidavit in response to the Order to Show Cause are any facts alleged to show that either appellant or appellee is engaged in any illegal activity, nor was it alleged by way of a conclusion of fact or law or otherwise.

The sole intimation that Consolidated might be doing something illegal comes not by way of anything alleged by appellee or verified by it, but by appellee attaching to its Answer, as an Exhiibt, a copy of the opinion of the Public Utilities Commission of the State of California. That opinion, if it were applicable or relevant in the instant case, does not show that Consolidated was violating any law. Furthermore, the Public Utilities Commission did not intend to say or attempt to say that Consolidated was violating any law of the State of California. This statement is substantiated by analysis of the opinion of the Public Utilities Commission which is found beginning on page 57 of the Record.

It must be kept in mind that the opinion of the Public Utilities Commission dealt with two news services—namely, Continental Press Service (appellant in this case), and the Pioneer News Service, not a party herein. Continental Press is located in Chicago and Cleveland while the Pioneer News Service has its headquarters in San Francisco. The Public Utilities Commission opinion sets forth a list of the drops of appellant, Continental Press, and included among those drops is the one of Consolidated Publishing Company [R. 60]. The Public Utilities Commission opinion then sets forth a list of the drops of the Pioneer News [R. 60, 61]. Thereafter the Public Utilities Commission opinion proceeds to talk generally of "wire services" without indicating whether reference is being made to appellant or the Pioneer News or some other, and says:

> "apparently, at the other end of these phones, bookmakers are listening for the information." [R. 63.]

Several pages later in the Public Utilities Commission opinion, this statement is found:

> "At *some* of these locations, including drops on the previously mentioned wire services, it was found that bookmaking was being carried on." [R. 65.] (Emphasis supplied.)

And, again several pages later:

> "The evidence in this case shows that *some* of the users of these wire services are engaged in bookmaking." [R. 68.] (Emphasis supplied.)

From the foregoing references to the opinion of the Public Utilities Commission, it is apparent that that opinion did not state or even indicate that Consolidated was engaged in any form of bookmaking or any other illegal activity. As a matter of fact, a reading of the testimony before the Public Utilities Commission and a study of its opinion discloses that the Commission, when speaking of bookmaking, was actually referring to some persons who were several times removed from any particular wire service.

The only other statements in the Transcript of Record respecting alleged violations of law were in the letters of the Attorney General and the Sheriff of Kern County. A cursory reading of the Attorney General's letter will readily disclose that it does not assert that Consolidated was violating any law whatsoever. The opening paragraph of the letter states:

> "A survey of the transcript of the proceedings of February 18, 19, 25 and 26, and of March 10, 1948, before the Public Utilities Commission of the State

> of California at its hearings pertaining to the illegal use of Western Union wire services and/or telephonic equipment, *indicates* that you had leased wires to the Continental Press Service, which were and are engaged in furnishing information to bookmakers in violation of Section 337a of the Penal Code of the State of California, at the following addresses:" [R. 35.] (Emphasis supplied.)

The letter then lists several addresses among which is included that of Consolidated.

The Attorney General's letter does not say that bookmaking is carried on at the various addresses listed but that his survey of the transcript of the proceedings of the Public Utilities Commission:

> "* * * *indicates that you had leased wires to the Continental Press Service, which were and are engaged in furnishing information to bookmakers* * * *." (Emphasis supplied.)

Not only does the notice from the Attorney General fail to disclose that Consolidated was violating any law, but it also fails to meet the requirements of Tariff 219(8) in so far as a notice of a violation of law is concerned. The Tariff requires the notice to state that "the service is being supplied contrary to law." This is not done by the Attorney General's letter. The Attorney General merely said that the Public Utilities Commission *"indicates"* that appellant is furnishing news to bookmakers at various addresses, one being that of Consolidated. Thus it is obvious that the Attorney General is not saying that Consolidated is violating the law but merely that the Public Utilities

Commission has indicated such was the case, and, as heretofore pointed out, the Public Utilities Commission opinion does not indicate anything of the sort. If it did, appellee could not rely upon it for the simple reason that Tariff 219(8) provides that the notice shall be from a "federal or state law enforcing" agency, and the Public Utilities Commission is not a federal or state law enforcing agency.

The decision of this Court appears to be predicated upon the premise that the Transcript of Record did show that Consolidated was engaged in bookmaking and thus deprived appellant of selling its news to Consolidated because:

> "The guilty use of the drop in receiving the messages is enough to show an illegal use of the wires' service." (P. 3 of the Opinion.)

Had the opinion of the Public Utilities Commission and the letter of the Attorney General actually stated that Consolidated was violating the law of the State of California, it would not have supported the factual premise upon which this Court predicated its opinion. Certainly an opinion of a State Public Utilities Commission cannot be considered evidence, nor can a letter of any law enforcing officer. At most, both are mere matters of opinion, and, in the trial of the case in the lower court, would not have been admissible as evidence. Appellee, by merely annexing these two exhibits to its Answer, certainly could not transform those opinions into factual matter.

It further appears that this Honorable Court misconceived the relief sought by this suit. In the opening paragraph of this Court's opinion, it is stated that:

> "* * * McBride seeks to 'compel the restoration to him' by the telegraph Company of the *telegraph wire service to transmit race track news between cities in eastern states and California cities.* * * * and *that he cannot transmit such news 'over interstate Morse wire facilities* unless Defendant is compelled or required by order of this Court to continue to supply Plaintiff with such facilities'."

From the foregoing, it would appear that this Court interpreted this suit as an attempt to reinstate either appellant's transcontinental Morse wire or all of the various drops existing in California. Such is not the case at all. The transcontinental Morse wire of appellant, which crosses the United States and comes into California and then reaches into Canada and Mexico, has never at any time been disconnected [R. 3, 18]. It is only the drops in California which have been disconnected from the transcontinental Morse wire. This suit does not concern itself with any of those drops except one—that being Consolidated's. Thus the sole question in this case is whether or not appellant was entitled to have appellee reestablish the drop with Consolidated Publishing Company of Los Angeles.

In paragraph 3 on page 4 of this Court's opinion, reference is made by the Court to a notice of the Attorney General and of the Sheriff to the telegraph company:

> "that such illegitimate use of the drops was being made in several cities in California and by the Sheriff of Kern County, California, that such use was being made in the city of Bakersfield, California."

As heretofore pointed out, the only issue in this case related to the one drop being used by Consolidated in Los Angeles, and it appears that this Court mistakenly associated or connected these drops with the one of Consolidated. Again it is emphasized that the Transcript of Record clearly shows that Consolidated had no connection whatsoever with any drop in Bakersfield or with any other drop in the State of California.

Again this Court's attention is called to the last sentence of paragraph 3 on page 4 of its opinion wherein it was stated:

> "We do not agree that the notifying officers are required to supply to the telegraph company the probative facts to be adduced in court in the trial of the cases of violation stated in the notices."

From the above statement, it appears that this Court was under the impression that the Attorney General's office was in the process of preparation for a prosecution of some type. Nothing in the Record or otherwise indicates such to be the fact. The Attorney General was merely sending a notice under circumstances, not revealed in this Record, predicated upon the opinion of the Public Utilities Commission.

In paragraph 4 on page 4 of this Court's opinion, it appears that the contention made by appellant has been misconceived. The opinion states:

> "He contends, however, that his second cause of action requires the telegraph company to disregard the notices of the law enforcement officers *because they concern a past wrongdoing* and treat it as beginning *de novo* a litigation for the supplying of the

telegraphic and drop services which the company refuses him." (Emphasis supplied.)

Appellant's contention was and is that irrespective of the notice under Tariff 219(8) he was entitled under Section 406 of the Communications Act to a hearing in the District Court to show that actually at the time of the notice and at any time thereafter he or his customer, Consolidated, was not, in fact, violating any law of the Federal or State Governments and was, therefore, entitled to the restoration and return of the wire facilities. This Court's opinion indicates that the Court thought that appellant's position was that the suit would not relate to the legality of the service at the time of the notice but would only involve the question of legality after and during the time the suit was on file. Appellant contended and still contends that, after receipt of the notice, he was entitled to proceed to the District Court under Section 406 of the Communications Act and to then and there establish by competent proof that he was entitled to the restoration of the service because at the time the notice was received and thereafter he and his customer, Consolidated, were, in fact, in a legitimate business and neither was violating any law.

The foregoing references to the opinion of this Court clearly show that its decision was based upon two wholly erroneous statements of fact, namely:

(1) That through Consolidated Publishing Company's direction, the racing news was received through various drops in California; and

(2) That there was a guilty use of the drops by Consolidated in receiving the news.

Both statements are contrary to the Record in this case. Consolidated had nothing whatsoever to do with any drops in California except the one in Los Angeles by which it received news from appellant. Furthermore, Consolidated had no connection with appellant, Continental Press, except as a customer to purchase news. Nor did Consolidated have any connection, proprietary or otherwise, with appellant's other customers or drops [R. 13, 14, 15]. The relationship was simply that of vendor and vendee of news.

In regard to the second erroneous statement of fact, it must be assumed that this Court mistakenly assumed that the Record showed that violations of Section 337a of the Penal Code of California occurred at Consolidated's drop (its place of business) where it received the news. Nothing in the record supports such a conclusion. On the contrary, the Record shows, without question, that Consolidated was and is engaged solely in the dissemination of news through its publications which are sold on newsstands [R. 14, 15]. It transmits no news through wire facilities. Consolidated does not participate in or conduct wagering or bookmaking nor has it any connection or interest in such, either directly or indirectly [R. 15].

Not in all the years that Consolidated has sold its publications to the public has any official or any other person ever even so much as intimated that Consolidated was engaged in bookmaking or wagering of any type. Such is just not the fact and the record so shows. It would, therefore, appear that this Court's decision was predicated upon a misconception of the facts contained in the record.

II.

The Opinion Is in Direct Conflict With an Applicable State Decision.

The decision of this Court in the instant case is contrary to the decision of the District Court of Appeal of the State of California in the case of *People v. Brophy,* 49 Cal. App. 2d 15. Petition for hearing in the Supreme Court denied February 5, 1942.

In particular, this Court has construed Section 337a of the Penal Code of California directly contrary to the construction placed upon it by the District Court of Appeal in the *Brophy* case.

It cannot be doubted that this Court is bound to follow the construction placed upon the statute by the California Court.

> *Rules of Decision Act* (28 U. S. C. A., Sec. 725);
>
> *Erie R. Co. v. Tompkins,* 304 U. S. 64, 82 L. Ed. 1188;
>
> *Six Companies of California v. Joint Highway District No. 13 of the State of California,* 311 U. S. 180, 85 L. Ed. 114.

This Court's decision in the instant case is predicated upon the alleged guilty use of the drop in receiving messages.

> "The guilty use of the drops in receiving the messages is enough to show an illegal use of the wires' service." (Op. p. 3.)

This holding is diametrically opposed to the holding in the *Brophy* case. In that case the facts showed that the notice from the Attorney General specifically stated that

Brophy was furnishing information to bookmaking establishments throughout the state by telephone and other wire facilities. Furthermore, the telephone company set up as an affirmative defense that, following the letter from the Attorney General, it had made inquiry of the Attorney General and his deputies as to the nature of the evidence against Brophy; that the Attorney General and his assistants had informed the telephone company that law enforcement officers had been present at bookmaking establishments in the County of Los Angeles and had observed that information, which was used for the purpose and in connection with the placing of wagers upon horse races, was being received at said place over telephone equipment; that the law enforcement officers had checked the source of information and had found that it had emanated from Brophy's place of business from whence it was transmitted to said bookmaking establishments. The District Court of Appeal held, among other things, that:

> (1) "Respondent's claim that the furnishing of racing news to bookmaking establishings by telephone constitutes an aiding and abetting in a violation of section 337a of the Penal Code is without merit." (P. 33.)
>
> (2) "Simply because persons who received information transmitted over the telephone facilities were enabled as a result of such information, if they were so inclined, to commit unlawful acts, *does not make the telephone company a violator of the criminal laws.*" (Emphasis supplied.) (P. 33.)
>
> (3) "Furthermore, the furnishing or *receiving of racing or sporting information is not gambling and is not a crime.*" (Emphasis supplied.) (P. 34.)

Plainly, the *Brophy* case holds that the receiving of racing news is not a crime and does not violate section 337a of the Penal Code of California. Furthermore, it must be emphasized that in the *Brophy* case the receiving of the news was by bookmakers, and, despite that fact, the Court held that the receiving of the news was not a crime nor was the use of the wire facilities a crime.

This Court's decision is premised on a contrary principle of law, namely, that the receiving of the news is a violation of section 337a of the Penal Code. This is indicated by this Court's opinion in two places. In the last sentence of Paragraph 2 on page 4, this Court said:

> "It is not relevant to the contention here that the restoration of the service was properly denied by the telegraph company because it was advised by California law enforcement officers that the recipients of the news were bookmakers using the receiving drops in making racing bets, *thus causing the telegraph company to supply service violating the California law.*" (Emphasis supplied.)

The foregoing discloses that this Court concluded contrary to the holding in the *Brophy* case that the receiving of the news caused the Western Union to supply service which violated the California law. This holding is contrary to the California court statement on page 33, *People v. Brophy, supra:*

> "Simply because persons who received information transmitted over the telephone facilities were enabled as a result of such information, if they were so inclined, to commit unlawful acts, *does not make the telephone company a violator of the criminal laws.*" (Emphasis supplied.)

Thus, if Consolidated were actually engaged in bookmaking, which the Record discloses it was not, the receiving by it of the news would not be a violation of the California law by Consolidated, the supplier, Western Union or the wire facility.

In the first sentence of the last paragraph on page 3 of this Court's opinion, it was said:

> "The important factor in the regulation is that it is the 'service' being supplied by the telegraph company over its wires through any drop which it may discontinue on receiving notice that it is violating the law."

The notice from the Attorney General could not meet the requirements of Tariff 219(8) which requires that the notice advise "that the service is being supplied contrary to law" because, upon all of the facts in this Record, including the opinion of the Public Utilities Commission, those facts were insufficient under the *Brophy* case to constitute a violation of section 337a of the Penal Code or any other California law.

The decision of this Court in this case necessarily required an interpretation of section 337a of the Penal Code of California. It was upon a notice from the Attorney General which stated that violations of 337a were "indicated" by the opinion of the Public Utilities Commission that caused the Western Union to disconnect. No claim was made that any other state law or federal law was being violated. Thus this Court could not close its eyes to the record and merely assume a violation of 337a. To do so would be to ignore the basic concepts upon which our system of jurisprudence is founded. Certainly this Court was required to determine whether or not there was some

basis for the claimed violation, and to do so involved an interpretation and construction of 337a of the California Penal Code. Since the State court had placed its construction upon that law, this Court was bound to follow it.

Any other process of reasoning could lead only to this Court's conclusion that the *Brophy* case was not applicable. If this was the case, and it is not clear from this Court's opinion, this Court has in effect held that a mere notice alone is sufficient to forever deprive appellant of the wire facilities irrespective of whether or not there was any basis for the notice. Such a holding would obliterate the remedies provided by Congress in section 406 of the Communications Act and make the statute a nullity. Congress intended by the Act to give one legally entitled to a wire facility a speedy remedy in the District Courts. A determination by the District Court would require a decision upon evidence of the question of the right to the wire facility both at the time of the notice and thereafter and that, in turn, would require a construction and application of the state law. Certainly a mere notice of a law enforcing agency cannot destroy the remedies provided for by Congress.

It can be readily understood that there are probably many tariffs which give the Western Union the right to disconnect a wire facility under a given situation. In any such case where a discontinuance occurred, the obvious remedy is afforded by section 406 to sue in the District Court for a determination of the right to the wire facility both at the time of the notice and thereafter. Thus, in the instant case, the suit would require an adjudication of not only the legal right to the wire facility from the beginning of the suit, but also whether the notice was

with or without substance. This construction in no way conflicts with the intent and purpose of Tariff 219(8). The Tariff serves to protect the Western Union from the consequences of its act of discontinuance upon receiving notice in the event it should thereafter be determined by the District Court that the subscriber was legally entitled to the wire facility at the time of the notice and thereafter. In other words, the notice serves to permit a discontinuance pending adjudication if one is sought.

The reasoning of the *Brophy* case is analogous to a well-settled principle of law which was the subject of a well considered and scholarly opinion of Judge Learned Hand in the case of *United States v. Falcone* (C. C. A. 2d), 109 F. 2d 579, and which was affirmed by the Supreme Court, 311 U. S. 205, 85 L. Ed. 128. In that case certain jobbers, wholesalers and distributors were indicted as co-conspirators with certain operators of illicit stills. The jobbers, wholesalers and distributors supplied sugar, yeast and cans for use in the illicit distillery. The court held that the seller of goods did not become a conspirator or an abettor by such sale, although with knowledge, and reversed the judgments of conviction. Judge Hand said on page 581 of the opinion:

> "It is not enough that he does not forego a normally lawful activity, of the fruits of which he knows that others will make an unlawful use; he must in some sense promote their venture himself, make it his own, have a stake in its outcome."

It is respectfully urged that the *Brophy* case is applicable and that this Court is bound to follow the construction placed upon 337a of the Penal Code by the California Court.

III.

The Opinion Deprives Appellant Due Process Guaranteed to Him by the Fifth Amendment to the United States Constitution.

Appellant respectfully urges that this Court has construed Tariff 219(8) in such a way as to completely deny appellant procedural due process guaranteed to him under the Fifth Amendment to the United States Constitution. Appellant has been deprived of a property right, namely, that of selling his news to a publisher, Consolidated Publishing Company of Los Angeles, upon a mere notice, and an insufficient one at that, without a hearing in any forum on the merits of whether or not the supplying or receiving of such news is in violation of the California law.

The steps which led up to the denial of procedural due process to appellant are as follows:

The Attorney General of the State of California wrote a letter to appellee which purported to indicate that appellant's customer, Consolidated, was violating section 337a of the Penal Code of California. Western Union disconnected the drop by which Consolidated received its news for use in its publications from appellant.

Appellant filed a suit in the United States District Court of Southern California seeking relief under section 406 of the Communications Act and also an additional cause of action for equitable relief. Appellant, in his Complaint, set forth facts to show that both appellant and Consolidated, his customer, were engaged in a legal business. In support of the Order to Show Cause, appellant filed two affidavits, one by Edward J. McBride [R. 17] and the other by Harold V. Belden [R. 13], one of the partners of the firm of Consolidated.

The affidavit of Harold V. Belden described in detail the method of operation by Consolidated as a publisher of newspapers, commonly called "scratch sheets." That affidavit clearly showed that Consolidated was simply engaged in the distribution of publications through regular newsstands throughout the States of California and Nevada.

Appellee filed the affidavit of J. W. Inwood responsive to the Order to Show Cause, and that affidavit made no denial of any of the matters set forth in appellant's Complaint or the two supporting affidavits. It merely referred to the opinion of the Public Utilities Commission and the letter of the Attorney General.

Appellee also filed its Answer and in no place in that Answer was there any denial made of the allegations of appellant respecting the legality of the business of either appellant or Consolidated. As a matter of fact, appellee in its Answer alleged that it was without knowledge and denied on information and belief that appellant was engaged in the business of disseminating information of sporting events or racing news "either over interstate and foreign communications wires and facilities of defendant or otherwise; * * *." [R. 54.]

Furthermore, in its Answer, appellee alleged that it was without knowledge concerning the business of Consolidated and denied upon information and belief that it was engaged in disseminating racing news through publications [R. 49 and 50].

Appellee in its Answer set up the letter from the Attorney General [R. 73-75] and attached a copy of the opinion of the Public Utilities Commission of California as an exhibit thereto [R. 56].

Prior to a trial, the District Court ruled that it had no jurisdiction thus preventing appellant from a trial on the merits of whether or not he was entitled to relief under section 406 of the Communications Act. Thereupon it was necessary for appellant to lodge this appeal in order to establish that the District Court did have the jurisdiction under section 406 to determine whether or not appellant was entitled to the relief sought. This Court, upon this state of the Record, decided that the lower court did have jurisdiction; but, because of the notice of the Attorney General, appellant was forever precluded from any relief irrespective of whether or not he or his customer, Consolidated, may have been engaged in a legal business at the time of the notice and thereafter. Thus this Court has adjudicated that appellant is not legally entitled to transmit his news to Consolidated, his customer, upon a mere statement of a law enforcement officer and has thereby deprived appellant, without a hearing on the merits, of a valuable property right, namely, that of distributing and selling his news to his customer, Consolidated.

In arriving at such a conclusion, this Honorable Court has construed Tariff 219(8) in such a way as to deprive appellant of procedural due process. The construction placed upon the Tariff by this Court is that mere notice from a law enforcing agency alone not only permits the Western Union to discontinue the service but to forever refuse such service because of the notice without appellant's being permitted to show that at the time of the notice and thereafter he was justly and legally entitled to the wire facility under section 406. For example, if it should have developed that the notice from the Attorney General had inadvertently named Consolidated, under

the foregoing interpretation appellant would have no relief afforded him because the notice presupposes illegality. In the last paragraph of this Court's opinion, it is stated:

> "The effect of such a construction would make nugatory the provisions of Section 219(8). A new illegal use would follow to be stopped only long enough for the bringing of another such suit as here. The process of law violation would continue indefinitely with only minor stoppages by an impotent Attorney General. The telegraph company may rely on the Attorney General's and the county sheriff's notices as sufficient to justify the telegraph company's refusal to render the services, which, as both complaints describe it, would be a continuing of past services." (Op. p. 5.)

The foregoing remark presupposes illegality without the opportunity on the part of appellant for a determination on the merits of whether or not there was any violation of law by him or his customer. Such an interpretation of the Tariff clearly deprives appellant of due process, and the letter of the Attorney General amounts to an adjudication of his rights and prevents appellant from seeking relief in a court and showing that he is actually entitled to the service.

Appellant has contended from the beginning that any notice under the Tariff that the facility is being used illegally affords a concomitant right to the person using the facilities to apply to the Court for the purpose of showing that he was entitled to the service at the time of the notice and thereafter. There would be no necessity of attacking the Tariff since the Court in which the relief was sought would necessarily have to determine whether,

at the time of the notice and thereafter, the user was legally entitled to the wire facilities.

The Court's interpretation of Tariff 219(8) in the decision in this case also imperils all wire services such as Associated Press, United Press and International News Service. Those companies use leased wires of Western Union and disseminate news to thousands of customers throughout the country including newspapers, radio stations and individuals. Yet, under the decision in this case, a mere notice from the Attorney General of California, in the form of an opinion, would be sufficient to cause the Western Union to terminate such wire facilities. Thereafter the wire service, whichever it might be, would be precluded from seeking relief under Section 406 of the Communications Act because, under the holding of this Court, a notice presupposes and adjudicates illegality and denies the right to seek an adjudication on the merits.

This Court's interpretation of Tariff 219(8) also raises a serious question as to whether or not such interpretation would cause the action of the state law enforcing agency to infringe upon Section 1 of the Fourteenth Amendment of the United States Constitution, which provides:

> "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *"

As heretofore pointed out, this Court's opinion has placed such a construction upon the Tariff as to make a mere notice from a law enforcing agency alone sufficient not only to terminate the service but to forever withhold it from appellant or anyone without a hearing on the merits of his right to such service at the time of the notice and thereafter. Accordingly, under the interpretation

placed upon Tariff 219(8) by this Court, all that is necessary for the permanent discontinuance of a wire facility is a mere notice from a law enforcing agency irrespective of whether or not such notice is erroneous, arbitrary, capricious, speculative or without any foundation of fact whatsoever. Furthermore, the phrase "law enforcing agency" would appear to include any officer from constable to the Attorney General of the State, for law enforcing agency has commonly been interpreted to mean any person charged with the enforcement of the criminal laws in any capacity. Such a procedure completely obliterates due process in substance and in essence, for it condemns without a hearing.

A business built through the toil of years can be completely wiped out by the mere fiat of a State officer who may be acting in a wholly irresponsible way or without any motive connected with law enforcement. Upon such a premise, a citizen may be deprived of his property rights and his business condemned without an opportunity of a hearing in the Courts which were established to protect his rights to show that at the time of the notice and thereafter he was actually engaged in a business which is not only legal but one which the Constitution and the laws of this country were formulated to protect.

The peril to this appellant is no less than that which, under this decision, will threaten such organizations as the Associated Press, United Press, International News Service, Trans-Radio News and all of the other services supplying news of all types and kinds to newspapers, radio stations, brokers and individuals in every type of business in the United States and throughout the world. For, under this decision, the Attorney General of the State of California may, upon a flimsy notice, cause the Western

Union to terminate its leased wire facilities to any of these organizations and deprive the great news-gathering agencies of their customers without a resort to a final determination upon the merits of whether or not such services were at the time of the notice or thereafter violating any laws of the State of California. If this decision stands, there would appear to be no reason why the Attorney General of the State of California could not give the same type of notice and deprive appellant's customer, Consolidated, of its drop through which it now receives the news from United Press.

Since the return of legalized racing to the State of California, many attempts have been made to stifle national news agencies which disseminate racing news without success. The first attempt was made by Earl Warren, then Attorney General of the State of California, in 1940. At that time an injunction was obtained in the Superior Court of Los Angeles County restraining various and sundry persons from distributing racing news "for the illegal operation of bookmaking establishments" by telegraph, telephone and in other ways. After certain of the persons restrained were adjudicated in contempt of court in violation of the injunction, a writ of habeas corpus was sought in the Supreme Court of California for their release and in two cases that Court held that the injunction was invalid.

See:

Kreling v. The Superior Court of Los Angeles County, 18 Cal. 2d 884;

In re Harry E. Moore on Habeas Corpus, 18 Cal. 2d 889.

Shortly thereafter the District Court of Appeal handed down the *Brophy* decision again clearly sustaining the validity of the dissemination of racing news. In connection with the *Brophy* case, it should be noted that the District Court of Appeal gave careful consideration to the matter of whether the furnishing or receiving of news of this type violated Section 337a of the Penal Code of California, and decided that it did not. Also, the opinion went to great lengths to thwart the effort of the law enforcing agencies to infringe upon the free dissemination of news.

It is common knowledge that over all these years during the time which these abortive efforts have been made to stop the dissemination of racing news, not one prosecution has ever been instituted by any of the law enforcing agencies upon the theory that the furnishing or receiving of racing news is a violation of Section 337a of the Penal Code of California. In this connection, this Court's attention is called to the fact that the *amicus curiae* brief of the Public Utilities Commission of the State of California did not even contend that the furnishing or receiving of racing news is illegal. The whole tenor and theory of that brief was that there should be a "changed application of the rules." (Amicus Curiae Brief, p. 10.)

It may well be that some of the careless statements of the brief of *amicus curiae,* which were wholly at variance with the record, misled this Court and for that reason, and that reason only, reference is made to that brief. In the first place, it needs no citation of law for the proposition that the Public Utilities Commission is not a law enforcing agency and that, if the State of California had appeared in this matter by the one duly constituted by

law, it would have been the Attorney General and not the Public Utilities Commission.

Analysis of the *amicus curiae* brief discloses that, at best, it is a resort to adjectives and is a condemnation generally of the so-called bookmaking racket. At no place does that brief state that the furnishing or receiving of racing news is illegal but, on the contrary, its equivocating and vacillating reasoning calls upon this Court:

> "The law must be realistic and keep abreast of this race to pervert progress in invention to the fell purpose of organized crime. The public interest demands that the law, on its part, be as resourceful and progressive and—if you please—as realistic as are the cynical leaders of the criminal syndicates." (A. C. Br. p. 9.)

Again it is repeated that the *amicus curiae* brief does not with frankness and directness claim that the furnishing or receiving of racing news is a crime, but, on the contrary, says:

> "We do not take the position that the rules of law should be tortured into special application to meet this threat of organized crime without and beyond the accepted standards of due process and equal protection of the law. We do contend, however, that, while rules and principles of law do not change, the facts and circumstances of a situation may call for *a changed application of the rules.* Power of government does not change but special circumstances may call forth and give rise to legitimate application of a power of government that in different circumstances lawfully could not have been applied." (Emphasis supplied.) (A. C. Br. p. 10.)

If it was seriously contended by the Public Utilities Commission that the furnishing or receiving of racing news is a crime, then why all the equivocation as set forth above? At least somewhere in the brief of the Public Utilities Commission or in its opinion it should have directly stated or taken the position that the furnishing or receiving of racing news is a crime. There can be little doubt that, had the Public Utilities Commission and its counsel sincerely believed that the furnishing or receiving of racing news was a violation of Section 337a of the Penal Code of California, its opinion or its brief would have so stated.

It is respectfully urged that the interpretation placed upon Tariff 219(8) by this Court would make such Tariff invalid and contrary to law on its face whereas an appropriate and reasonable interpretation may sustain the validity of the Tariff and at the same time preserve the rights of appellant. The obvious intent and purpose of Tariff 219(8) was to permit the Western Union to discontinue its wire facilities to appellant or any other customer if one of two things occurred: (1) If the facility was being used to violate the law, either directly or indirectly, or (2) upon notice from a law enforcing agency that "the service is being provided contrary to law." Of course, the first proposition presupposes actual proof of a violation whereas the second serves to protect the Western Union for a disconnection until there can be an adjudication if one is sought by the aggrieved customer of Western Union.

It should be kept in mind that a Tariff such as 219(8) is actually prepared by the Western Union and filed with the Federal Communications Commission, and, if no objection is raised, becomes effective after a statutory period has elapsed. It is obvious that the Western Union, in preparing and filing the tariff, was doing so to protect itself and it certainly did not contemplate that a mere notice would preclude an ultimate hearing and adjudication upon the merits as to whether or not there was a violation of law.

The only reasonable interpretation, which is in accord with due process, is that after the notice has been given the aggrieved party, he has the right to proceed to court under Section 406 of the Federal Communications Act and have adjudicated whether or not he was violating the law and whether he was legally entitled to the service at the time of the notice and thereafter. A construction which deprives appellant of such a hearing and adjudication certainly denies him the due process guaranteed to him under the Constitution.

The last paragraph of this Court's opinion indicates that this Court misconceived the nature of the suit under Section 406 of the Communications Act. It appears that this Court thought that the suit would not relate to the legality of the service at the time of the notice, but would only involve the question of legality after and during the time the suit was on file. Thus, under the Court's interpretation, the so-called illegal act having passed, the service would be restored, a new notice would follow and in

turn a new suit. This, it is submitted, was not the theory of appellant's suit or his argument, but, on the contrary, his contention was that, once a notice having been received by the Western Union, he was then entitled to his day in court to show that actually at the time of the notice or at any time thereafter he or his customer, Consolidated, was not in fact violating any law of the Federal or State Governments and was, therefore, entitled to the restoration and return of the wire facilities. Such an interpretation would accord due process whereas the Court's interpretation would deny it.

The above construction contended for by appellant is consistent with procedural due process and would not render nugatory, as this Court thought, the provisions of Tariff 219(8). It also is in keeping with our established concept of due process as was so clearly stated by Chief Justice Taft in *Truax v. Corrigan,* 257 U. S. 312, 332, 66 L. Ed. 254, 263:

> "The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law—a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society."

IV.

The Opinion Abridges Appellant's Privilege of Free Speech and Freedom of the Press Guaranteed to Him by the First Amendment to the United States Constitution.

The construction placed upon Tariff 219(8) by this Court deprives appellant of his privilege to free speech and freedom of the press guaranteed by the First Amendment to the United States Constitution, and also raises a serious question as to whether the interpretation does not infringe upon the guarantees of the Fourteenth Amendment inhibiting states from restricting the aforementioned privileges guaranteed by the First Amendment.

It is respectfully urged that the interpretation of the Tariff by this Court actually results in complete censorship and throws open the gates wide for the policeman on the beat to set himself up as an arbiter as to what news shall be disseminated or received. Freedom of speech and freedom of the press will be restricted to those news services which are fortunate enough not to receive a notice from a law enforcing agency, for, under this Court's interpretation, a notice alone suffices to terminate the wire facility and conclude further inquiry into the privilege and right of the dissemination of the news. The power of censorship rests in the hands of the law enforcing agency thus causing a previous restraint upon free speech and freedom of the press.

There can be no doubt that the record in this case clearly shows that appellant's customer, Consolidated Publishing

Company, is engaged in the business of disseminating news through publications, and Consolidated, as well as its supplier, is protected under the First Amendment against abridgment of freedom of speech or of the press. As was said in the case of *Lovell v. City of Griffin,* 303 U. S. 444, 82 L. Ed. 949, 954:

> "The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest. The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion. What we have had recent occasion to say with respect to the vital importance of protecting this essential liberty from every sort of infringement need not be repeated."

It might be argued with force that, assuming that the record did show there had actually been a violation of law at the drop where Consolidated received its news, any effort to prohibit the dissemination of news to Consolidated thereafter would in effect be a previous restraint upon freedom of speech and freedom of the press, and, therefore, contrary to the First and Fourteenth Amendments. The preliminary freedom of speech and of the press does not depend upon proof or adjudication that the exercise thereof is legal or illegal. In other words, neither can be restrained despite the fact that they may violate some law. If such exercise of the two freedoms infringe upon any civil right or violate any law, the remedy therefor is a suit for relief or prosecution by the duly constituted authority.

In *Near v. State of Minnesota Ex. Rel. Olson,* 283 U. S. 697, 75 L. Ed. 1357, the Supreme Court had before it a statute of the State of Minnesota which prohibited the publication of "a malicious, scandalous, and defamatory newspaper, magazine, or other periodical." The statute further provided that such publication would be a public nuisance and might be restricted by action of the County Attorney or the Attorney General. The Court held the statute invalid and throughout the opinion, which was written by Chief Justice Hughes, it was reiterated that there could be no previous restraint upon free speech or freedom of the press irrespective of whether the matter was libelous or violated some law. The Court further pointed out that the preliminary freedom against previous restraint must remain untrammelled despite the fact that every occurrence might be a violation of someone's civil rights or of some criminal law. Furthermore, that the remedy for such was not in the previous restraint which was illegal, but in a suit for civil redress or by way of prosecution if the offense should be in violation of any criminal statute.

Again it is urged that this Court's decision interprets Tariff 219(8) in such a way as to impose a restriction upon the freedom of dissemination of news, which is free speech, and consequently restriction upon the freedom of the press of Consolidated, appellant's customer.

It is common knowledge that certain radio stations throughout the State of California and the United States broadcast the news concerning races, including the results thereof and the prices paid on the winning horses. It certainly would not be contended that the radio stations might be deprived of their privilege of disseminating such

news because it was received at the place where the bookmaking was carried on and actually aided in the consummation of the wagers.

Conclusion.

It is respectfully submitted that the decision of this Honorable Court is erroneous in the several particulars heretofore set forth, to the detriment and prejudice of the appellant in this case, and that appellant is justly entitled to a reconsideration and to a rehearing in order that he may fully and completely present the errors complained of, and that upon further consideration the judgment of this Court may be modified and the relief granted to appellant to which he is entitled.

Respectfully submitted,

CHARLES H. CARR,

Attorney for Appellant.

Certificate of Counsel.

I, counsel for the above named appellant, do hereby certify that the foregoing Petition for Rehearing of this cause, in my opinion, is well founded, fully justified and that it is not interposed for delay.

CHARLES H. CARR,

Attorney for Appellant.